NEW W-2 REPORTING REQUIREMENT MANDATED BY FEDERAL HEALTH CARE LAW

By Steven H. Gunn

The massive Patient Protection and Affordable Care Act of 2010 ("PPACA") was signed into law by President Obama on March 23, 2010. The law will be implemented in phases extending over a period of eight years. There is one provision of the Act which will become effective on January 1, 2011 of which employers should be aware and for which they should begin to prepare. Section 9002 of the Act requires that employers disclose the cost of the health insurance benefits which they will provide in 2011 on the employee's Form W-2 for that year. This disclosure is purely for the information of the employee and is intended to show employees the value of their health care benefits. Nonetheless, the placing of the required information on the Form W-2 will doubtless confuse some employees who may think they are being taxed for the described benefits. Employers should therefore be prepared to assure their employees that they will not be taxed for the health care costs reported on their W-2s.

The reporting requirement of the Act immediately raises one issue: How will the cost of health care benefits be computed? Section 9002 provides that computation of the cost will be determined "under rules *similar*" to those used in computing the cost of COBRA coverage. The Congressional Joint Committee on Taxation has prepared a "technical explanation" of some of the provisions of the PPACA. In its "explanation" the Committee states that the cost of the benefit *will be determined* in the same manner as COBRA coverage costs, "including the special rule for self-insured plans." The coverage costs that must be reported are those of medical plans, prescription drug plans, dental and vision plans, executive physicals, onsite clinics, Medicare supplemental policies and employee assistance programs. Employers will only be required to report the aggregate costs, not the individual breakdown of the aggregate.

It is not yet clear where on the Form W-2 the value of the employee's health insurance coverage will be reported. The likelihood is that it will be reported in Box 12.

Although most employees will not receive their Form W-2 for 2011 until January of 2012, terminating employees whose employment ends early in the year are entitled to demand a W-2 within thirty days of termination. Employers could therefore be required to produce a Form W-2 as early as February 1, 2011. The problem is that the IRS has not yet prepared the 2011 form. In a recent telephone conference with payroll service industry representatives, the IRS stated that changes to the 2011 W-2 specifications and instructions will likely be made and published before the end of the year. In the event that such a form is not produced in time for employers to provide it to employees who terminate during the early part of 2011, there is some indication that the IRS is willing to adopt a "good faith" employer compliance standard in the interim.

For now, at least, employers will simply have to adopt a "wait and see" attitude about the new W-2 requirement and be ready to move quickly once the new form has been adopted.❖

Tax & Business Newsletter

Samuel A. Lambert – Editor

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Tax & Business Newsletter

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ALSO INSIDE THIS ISSUE

2010 Small Business Jobs Act: Immediate Tax Cuts

By Anjali Patel

On September 27, 2010, the Small Business Jobs Act ("SBJA") became law. The $42 billion act, which takes effect immediately, contains a number of important tax provisions for small and large businesses as well changes that affect individuals. Below is a summary of some of the more important changes:

1. Extension/Expansion of Ability to Immediately Expense Capital Investments. The SBJA increases to $500,000 for 2010 and 2011 the amount of Section 179 property that businesses would be eligible to immediately expense, while raising the level of investment at which the deduction begins to phase out to $2 million. Prior to the passage of the SBJA, the expensing limit would have been $250,000 this year, and only $25,000 next year. The SBJA will also allow taxpayers to elect to treat up to $250,000 of qualified real property as expensing-eligible property. Small businesses may decide to accelerate business investment plans to take advantage of this change.

2. Extension of 50% Bonus Depreciation. The SBJA extends the 50% accelerated "bonus depreciation," allowed under prior law, through 2010. This extension will grant businesses, large and small, an additional incentive to make investments in qualifying property before the end of the year, and should free up cash in businesses that already made such investments and didn't anticipate bonus depreciation this year.

3. Increased Penalties for Failure to File Form 1099. The penalty for failure to file 1099s has been doubled. The tiered-penalty has been raised from $15, $30, and $50 to $30, $60, and $100, respectively. A similar set of tiers will now apply for failure to furnish 1099s to payees.

4. A New Deduction of Health Insurance Costs for Self-Employed. The SBJA, for 2010, allows self-employed individuals to deduct, in calculating their self-employment taxes, the cost of health insurance for themselves and their family members.

5. Tax Relief and Simplification for Cell Phone Deductions. The SBJA finally allows for the deduction of cell phone expenses without burdensome extra documentation. Cell phones are no longer listed property under § 280F.

6. 100% Exclusion of Capital Gains from Sale of Qualified Small Business Stock. Under previous law, 75% of capital gains were excluded on sales of qualified stock. The SBJA eliminates for 2010 all capital gain taxes on qualified stock held for five years.

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Reminder of RQN Fall Seminar

Please be reminded that the Firm's Annual Tax & Business Seminar, **highlighting the Small Business Jobs Act of 2010**, is scheduled to be held on Thursday, November 4, 2010, from 1:30 to 4:30 p.m. at the Little America Hotel, 500 South Main Street, Salt Lake City, Utah. Please contact our receptionist at 801-532-1500 to register for the Seminar. You may also register at the door.

THE IMPACT OF DODD-FRANK ON SMALL BUSINESSES

By Mark W. Pugsley

On July 15, the U.S. Senate passed the "Dodd-Frank Wall Street Reform and Consumer Protection Act" (the "Act") otherwise known as the Wall Street Reform bill. President Obama signed the bill on July 21, 2010 – putting into place the most significant and sweeping changes to our country's financial regulatory system since the Great Depression. The Act includes many new programs and regulatory changes that will affect individuals and businesses of all sizes. Although we cannot cover all of the changes in an article of this size, here are a couple of changes you should be aware of.

Changes to the Definition of an Accredited Investor

One of the most significant changes for companies that are seeking to raise money is the change in the definition of an "accredited investor" for private offerings under Regulation D of the Securities Act of 1933. Prior to the passage of this bill an accredited investor was defined as someone with a net worth that exceeds $1 million at the time of investment or who has an income exceeding $200,000 in each of the two most recent years, or joint income with a spouse exceeding $300,000 for those years and a reasonable expectation of the same income level in the current year.

As of July 21, 2010, to be an "accredited investor" under Section 501(a)(5) of Regulation D, you need to have an individual net worth, or joint net worth with your spouse, at the time of purchase in excess of $1,000,000 – but this now *excludes* the value of your primary residence. Previously, the value of the investor's primary residence was included in the net worth calculation. This change will significantly reduce the pool of accredited investors for companies seeking to raise capital.

New Whistleblower Provisions

The Act also includes a new whistleblower program that could pay potentially large cash rewards to individuals who report securities violations to the Securities and Exchange Commission ("SEC"). For the first time in history, the SEC has been authorized to pay whistleblowers between 10%, and 30% of monetary sanctions obtained in a successful enforcement action by the SEC, as long as the sanction obtained is more than $1 million. It also contains new protections from retaliation by companies against whistleblowers.

These new cash incentives will surely lead to a significant increase in the number of reports to the SEC against Utah companies. There are several things a company can do to protect itself. First, develop robust internal controls and procedures to ensure that all employees conduct themselves in a lawful manner. Second, implement internal compliance audits to identify issues that need to be dealt with and that lead to implementation of additional internal controls and/or training.

Companies who become aware that the SEC has initiated an investigation should immediately retain independent outside counsel to conduct an internal investigation into the allegations. The benefits of internal investigations and self-reporting (if appropriate) are compelling. Aggressive efforts to investigate and resolve problems internally can demonstrate to the SEC that the conduct has been stopped and does not merit a full investigation. On balance, the cost of dealing with these issues internally is typically far less than the cost and risk of protracted litigation with the SEC.

Mark W. Pugsley is the chair of the Securities Litigation Group at Ray Quinney & Nebeker and handles cases involving investment fraud and securities disputes. He also maintains a blog on these issues: Utahsecuritiesfraud.com.❖

GIFTING IN THE TWILIGHT, BEFORE EGTRRA SUNSET

By Narrvel Hall

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) introduced historically low transfer tax rates and, for 2010 only, the suspension of the estate tax and the generation skipping transfer tax ("GSTT"). All of these provisions of EGTRAA "sunset" at the end of 2010 and the prior rules of the Internal Revenue Code ("IRC"), including the estate tax, the GSTT and higher rates, are reinstated on January 1, 2011 "as if" the provisions of EGTRRA had "never been enacted" (barring an increasingly unlikely extension by Congress).

After sunset, the tax free amount of your estate which can be left to non-spouse beneficiaries will revert to $1,000,000. The 2010 gift tax rate is 35 percent. At sunset the IRC will revert to 2001 gift tax rates topping out at 55 percent. Assuming that transfers at death will eventually pass valuable assets from your taxable estate to your heirs and beneficiaries at a presumptive estate tax rate of 55 percent, you may want to consider the alternative of making substantial taxable gifts this year at a 35 percent tax rate. Not only will you save 20 percent at the top tax rates, but if you live for at least three years after making the gift, the gift tax paid is also excluded from your eventual taxable estate. Of course, the 20 percent saved on the marginal rate will leave additional value in your estate, if the savings are retained until death. Therefore, at a 55 percent estate tax rate, the effective savings on the gift tax nets out at 9 percent after your death. If you have a large estate, 9 percent savings can be substantial. Furthermore, if the gift appreciates and/or produces income between your 2010 gift and the date of your death, the appreciation/income will have accrued outside your taxable estate.

Taxable gifts can be made outright or in trust. If you intend to leave assets for "skip persons" (your grandchildren and/or their descendants), after sunset such gifts outright or in trust, which exceed the $1.3 million then available exclusion for GSTT purposes, will be subject to a 55 percent GSTT tax plus a 55 percent gift tax (nominally over 100 percent in the aggregate, before calculation of offsetting credit) after sunset. Since there is no GSTT tax in 2010, however, you should consider making intended transfers to skip persons before sunset.

Contact a member of the Ray Quinney & Nebeker Estates, Trusts and Tax Section to discuss the specifics of your situation.❖

2010 SBJA: Immediate Tax Cuts continued from page 1

7. An Increase in the Deduction for Entrepreneurs' Start-Up Expenses. The SBJA temporarily increases (for 2010) the amount of start-up expenditures entrepreneurs can deduct under section 195 from $5,000 to $10,000 (with a phase-out threshold increased to $60,000).

8. A Five-Year Carry Back of General Business Credits. The SBJA allows eligible small businesses to carry back their general business credits five years, and will also allow eligible small businesses, for their tax year beginning in 2010, to use general business credits to offset the Alternative Minimum Tax.

9. Limitations on Penalties for Errors in Tax Reporting That Disproportionately Affect Small Business. The SBJA retroactively (to 2007) changes the § 6707A penalty for failing to report certain tax transactions, from a fixed dollar amount – which was criticized for imposing a disproportionately large penalty on small businesses in certain circumstances – to a percentage of the tax benefits from the transaction.

10. Shortened Period for Recognition of S Corporation Built In Gains

For 2010, the 10-year period to recognize built in gains is effectively shortened to 7 years, and for 2011, the period is reduced to 5 years.❖